No. 92-602

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ST. MARY'S HONOR CENTER AND STEVE LONG,

Petitioners,

v.

MELVIN HICKS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND OTHERS* AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND OTHERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee"), the American Civil Liberties Union ("ACLU"), the Women's Legal Defense Fund ("WLDF"), the American Association of Retired Persons ("AARP"), the National Women's Law Center ("Center") and the Mexican American Legal Defense and Educational Fund ("MALDEF") respectfully submit this brief as *amici curiae*. The written consents of the parties are being filed with the Clerk of this Court simultaneously with this brief. This brief urges affirmance of the Eighth Circuit's decision in *Hicks* v. *St. Mary's Honor Center and Steve Long*, 970 F.2d 487 (8th Cir. 1992), and thus supports the position of respondent.

INTEREST OF THE *AMICI CURIAE*

The Lawyers' Committee is a nonprofit organization that was established at the request of the President of the United States in 1963, to involve leading members of the bar throughout the country in the national effort to insure civil rights to all Americans. It has represented and assisted other lawyers in representing numerous plaintiffs in administrative proceedings and lawsuits under Title VII. *See, e.g., Lewis* v. *Bloomsburg Mills, Inc.*, 773 F.2d 561 (4th Cir. 1985); *Payne* v. *Travenol Laboratories, Inc.*, 673 F.2d 798 (5th Cir.), *cert. denied*, 459 U.S. 1038 (1982); *Sledge* v. *J.P. Stevens & Co.*, 585 F.2d 625 (4th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979). The Lawyers' Committee has also represented parties and participated as an *amicus* in Title VII cases before this Court. *See, e.g., Wards Cove Packing Co., Inc.* v. *Atonio*, 490 U.S. 642 (1989); *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977 (1988); *Connecticut* v. *Teal*, 457 U.S. 440 (1982); *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977).

The ACLU is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to preserving and enhancing the fundamental civil rights and civil liberties embodied in the Constitution and civil rights laws of this country. In particular, the ACLU has long been involved in the effort to eliminate racial discrimination in our society. The Women's Rights Project of the ACLU Foundation was established to work toward the elimination of gender-based discrimination in our society. In pursuit of that goal, the ACLU has participated in numerous discrimination cases before this Court.

The WLDF is a national advocacy organization that was founded in 1971 to advance the rights of women in the areas of work and family. The WLDF works to challenge gender discrimination in the workplace through litigation of significant sex discrimination cases, public education, and advocacy for improvements in the equal employment opportunity laws and their interpretation before Congress and the federal agencies charged with their enforcement. Throughout this work, the WLDF has placed special emphasis on equal employment opportunity for

women of color, who often face job discrimination based on both race and gender.

The AARP is a nonprofit membership organization of persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. More than one-third of the AARP's thirty-four million members are employed, most of whom are protected by Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000(e) *et seq.* (1988) and the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* (1967) ("ADEA"). One of the AARP's primary objectives is to strive to achieve dignity and equality in the workplace through positive attitudes, practices and policies regarding work and retirement. In pursuit of this objective, the AARP has participated as *amicus curiae* in numerous discrimination cases before this Court and the federal courts of appeals.

The Center is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Full enforcement of Title VII is essential in order to provide women equal opportunity in the workplace. Consequently, the Center has a deep and abiding interest in ensuring that Title VII continues to protect women from workplace discrimination.

The MALDEF is a national nonprofit civil rights organization established in 1967. Its principal objective is to secure the civil rights of Latinos in the United States through litigation and education. It has frequently represented plaintiffs in all phases of litigation under Title VII and appeared as an *amicus* in federal courts, including cases before this Court.

The question presented by this case raises important and recurring issues. The vast majority of the employment discrimination cases filed each year under Title VII and ADEA involve disparate treatment claims. In most of those cases, there is no direct evidence of discrimination. In evaluating what is largely circumstantial evidence, courts are bound by the three-part standard established in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973) and in *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981). That framework permits triers of fact to infer

intentional discrimination by determining whether the employer's stated reasons for the challenged employment action are a pretext for discrimination. *Burdine*, 450 U.S. at 253, 256.

The Lawyers' Committee, the ACLU, the WLDF, the AARP, the Center and the MALDEF have an interest in ensuring that this Court adopts principles that will result in the sound administration of the discrimination laws, so that persons with legitimate claims and limited resources will be able to prevail. This Court's decision will have far reaching and important implications for present and future employment discrimination cases in which the Lawyers' Committee, the ACLU, the WLDF, the AARP, the Center and the MALDEF participate.

STATEMENT OF THE CASE

Melvin Hicks filed suit against his former employer, St. Mary's Honor Center, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* (1988), and against the superintendent of that facility, Steve Long, under 42 U.S.C. § 1983 (1988).[1/] After he was demoted and then terminated from his position as shift commander, Hicks alleged that St. Mary's and Superintendent Long had discriminated against him on the basis of his race (he is an African-American). *Hicks* v. *St. Mary's Honor Center*, 756 F. Supp. 1244, 1245-46 (E.D. Mo. 1991) (Petition Appendix A-14–A-15).

A. Background

Hicks was hired as a correctional officer by St. Mary's, a minimum security correctional facility, in 1978. In 1980, he was promoted to shift commander, a supervisory position. Between 1978 and February 1984, Hicks' job performance was satisfactory.

[1/] Hicks also alleged that St. Mary's and Superintendent Long had violated 42 U.S.C. § 1981 (1988). Petitioners were granted summary judgment on this claim. *Hicks* v. *St Mary's Honor Center*, 756 F. Supp. 1244, 1245 (E.D. Mo. 1991) (Petition Appendix A-14).

He was never suspended, disciplined or demoted.[2/] (Pet. App. A-15—A-16).

The administration at St. Mary's changed dramatically in January 1984. The Chief of Custody and two shift commanders, all of whom were African-Americans, were replaced with whites. (Pet. App. A-15). Hicks was the only remaining African-American shift commander, and one of only two African-Americans left in a supervisory position. Hicks' new immediate supervisor, Captain John Powell, and the new superintendent of the facility, Steve Long, were both white. (Pet. App. A-15, A-2). These changes in the administration were made in the wake of a 1980-1981 study of St. Mary's and another honor center, which had concluded that "too many blacks were in positions of power at St. Mary's[.]" (Pet. App. A-21).

B. The "Crusade to Terminate" Hicks

After the change in administration, Hicks was disciplined in connection with three separate incidents.

On March 3, 1984, a white transportation officer at St. Mary's observed, and reported to Captain Powell, a number of minor violations of institutional rules committed by Hicks' subordinates during Hicks' shift. Although Hicks, who was performing a perimeter check of St. Mary's, was not present to observe or correct these alleged violations, a disciplinary review board recommended that he receive five days' suspension.[3/] The officers who were present and were responsible for the violations were not disciplined in any way. Although Captain Powell testified that it was his policy to discipline only the shift commander for violations occurring during his shift, white shift commanders were

[2/] In 1980, while he was on vacation, Hicks had mistakenly been cited for absence without notice. (Pet. App. A-16 n.4).

[3/] The disciplinary review board makes recommendations to the Superintendent who recommends action to the Director of the Missouri Department of Corrections and Human Resources, who then makes the ultimate disciplinary decision. (Pet. App. A-17 n.6).

not disciplined for rule violations committed by employees under their supervision. (Pet. App. A-16—A-17, A-24—A-26).

On March 19, 1984, Hicks permitted two correctional officers to use a St. Mary's vehicle. Neither of the correctional officers, nor the control center officer, logged the use of the vehicle as per institutional rules. Captain Powell brought charges against Hicks for failure to log the use of the vehicle. Neither the correctional officers who borrowed the vehicle nor the control center officer were disciplined. (Pet. App. A-17—A-18).

On March 24, 1984, Captain Powell charged Hicks with failing to investigate an inmate assault, even though Hicks had notified Captain Powell in writing of the incident and had instructed another correctional officer to submit a full report. On March 29, 1984, Captain Powell issued Hicks a letter of reprimand, citing his failure to investigate the assault. (Pet. App. A-18).

On April 19, 1984, Hicks was notified that he had been demoted from shift commander to correctional officer I as a result of the incident involving the borrowed vehicle. (Pet. App. A-17, A-18). According to the district court, Captain Powell and Hicks "exchanged heated words" shortly thereafter, when Captain Powell demanded that Hicks turn over his shift commander's manual. (Pet. App. A-18). The district court so found even though Captain Powell testified that he was not angry, and did not raise his voice or attempt to provoke Hicks. (Joint Appendix 38, 44, 46). Captain Powell sought disciplinary action against Hicks, claiming that Hicks had threatened him. (Pet. App. A-18).

On May 9, 1984, a disciplinary review board voted to suspend Hicks for three days. (Pet. App. A-18 - A-19). However, Superintendent Long disregarded the board's recommendation and recommended that Hicks be terminated based on the "severity and accumulation of [his] violations." (Pet. App. A-19). On June 7, 1984, Hicks was terminated. He was replaced by a white male. (Pet. App. A-19, A-23).

C. The Findings of the District Court

In reviewing the facts of the case, the district court found that:

> (1) "plaintiff was mysteriously the only person disciplined for violations actually committed by his subordinates[;]"
>
> (2) "plaintiff demonstrated . . . [that Captain Powell's] policy [of disciplining only shift commanders] only applied to violations which occurred on plaintiff's shift[;]"
>
> (3) "much more serious violations, when committed by plaintiff's [white] co-workers, were either disregarded or treated much more leniently[;]"
>
> (4) "plaintiff was treated much more harshly than his [white] co-workers who committed equally severe or more severe violations[;]" and
>
> (5) "plaintiff has proven the existence of a crusade to terminate him[.]"

(Pet. App. A-23 - A-27).

The district court determined that, under the *McDonnell Douglas-Burdine* standard, Hicks had established a *prima facie* case of racial discrimination, and also that he had proven petitioners' proffered reasons for his demotion and termination -- his purported infractions of institutional policies -- were not the actual reasons for his discharge. (Pet. App. A-22 - A-23, A-26, A-29).

Nonetheless, the court entered a verdict in favor of the defendants. The court decided that Hicks had not proven that his demotion and termination were the result of racial discrimination. The court determined, *sua sponte*, that "although plaintiff has proven the existence of a crusade to terminate him, he has not proven that the crusade was racially rather than personally

motivated." (Pet. App. A-27). Personal animosity was not proffered by petitioners as a possible explanation for their behavior, and Hicks had no opportunity to rebut this explanation at trial. Indeed, at trial, Captain Powell denied any suggestion that he had prompted a confrontation with Hicks and testified that there were no difficulties between the two men. (J.A. 38, 44, 46).

The district court made its finding despite the other evidence of racial discrimination at St. Mary's introduced by Hicks, particularly discrimination against African-Americans in supervisory positions. For example, Hicks demonstrated that:

> (1) approximately twelve African-Americans had been terminated by the new white administration at St. Mary's between January 1984 and December 1984, while only one white had been terminated;
>
> (2) prior to 1984, only the superintendent of St. Mary's was white, while the assistant superintendent, chief of custody and three shift commanders were African-American -- after Superintendent Long was hired, the assistant superintendent and plaintiff were the only remaining African-Americans in supervisory positions;
>
> (3) five of the ten white employees on the custody roster at St. Mary's as of April 1984 had been promoted; and
>
> (4) a 1981 study of St. Mary's and another honor center concluded that "too many blacks were in positions of power at St. Mary's[.]"

(Pet. App. A-27—A-28, A-21, A-6 n.6).

D. The Eighth Circuit's Decision

The Eighth Circuit reversed the district court's decision. The panel correctly determined that "it was improper for the district court to assume—without evidence to support the assumption—that defendants' actions were somehow 'personally

motivated.'" *Hicks* v. *St. Mary's Honor Center*, 970 F.2d 487, 492 (8th Cir. 1992) (Pet. App. A-10). The court further held that once the plaintiff "has met his or her burden of proof at the pretext stage . . . then the plaintiff has satisfied his or her ultimate burden of persuasion. No additional proof of discrimination is required." (Pet. App. A-11).

SUMMARY OF ARGUMENT

In *McDonnell Douglas* and *Burdine*, this Court created a sensible, orderly and just framework for proving intentional discrimination based on circumstantial evidence. That framework provides that once a plaintiff establishes a *prima facie* case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the action in question. This burden is not heavy -- it merely requires the employer to articulate its actual reason or reasons for its decision. If the employer satisfies this burden, then the employee is provided with a "full and fair opportunity" to demonstrate that the employer's rationale is pretextual, *i.e.*, that it was not the actual motivating reason(s). If the employee proves pretext, then a finding of liability is compelled because the employer's theory has been defeated or disproved, leaving discrimination as the proper inference for the underlying motivation.

If this Court were to hold that an employee must do more than prove pretext in order to prevail, then it would effectively be requiring the employee to proffer direct evidence of discrimination. As will be demonstrated below, a Title VII plaintiff has no viable alternative. Yet over the last twenty years, this Court has consistently and repeatedly rejected the notion that a plaintiff must introduce direct evidence of discrimination. Thus, affirming the Eighth Circuit's decision will preserve the plaintiff's opportunity to prove his or her case through circumstantial evidence.

ARGUMENT

I.

THE EIGHTH CIRCUIT'S DECISION IS CONSONANT WITH THE PRIOR HOLDINGS OF THIS COURT

Introductory Statement

In enacting Title VII, Congress sought to protect workers both in situations where discrimination is blatant and where it is subtle. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), and subsequent decisions have acknowledged that, while discrimination in the workplace is widespread, direct evidence of discrimination rarely exists. Consequently, this Court provided a mechanism by which plaintiffs could prove their discrimination claims through indirect evidence where direct evidence was lacking.

The proof structure in individual disparate treatment cases was first set forth in Justice Powell's unanimous decision in *McDonnell Douglas*. Under *McDonnell Douglas*:

> (1) the plaintiff must establish a *prima facie* case of discrimination—this creates a rebuttable presumption that the defendant has discriminated against the plaintiff;
>
> (2) in order to rebut the presumption of discrimination, the defendant must proffer "some legitimate, nondiscriminatory reason" for the employment decision; and
>
> (3) the plaintiff must then "be afforded a fair opportunity to show that [the defendant's] stated reason for [the plaintiff's] rejection was in fact pretext."

Id. at 802–804. Under this Court's decision in *Burdine*, the plaintiff can demonstrate pretext "either directly by persuading the court that a discriminatory reason more likely motivated the employer or

indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id.* at 256. It is critical to the *McDonnell Douglas–Burdine* formulation that a plaintiff is not required to introduce direct evidence of discrimination in order to prevail. *See, e.g., Int'l Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 358 n.44 (1977); *Burdine*, 450 U.S. at 256; *United States Postal Serv. Bd. of Govs.* v. *Aikens*, 460 U.S. 711, 714 n.3, 717 (1983).

Two competing views of the *McDonnell Douglas–Burdine* framework have developed in recent years concerning the proof a Title VII plaintiff must offer at the third, or pretext, stage.

Those courts that follow the literal language of *McDonnell Douglas–Burdine* hold that a discrimination plaintiff need only prove that the defendant's proffered reason for the adverse employment decision is pretextual in order to prevail. These "pretext only" courts adopt the reasoning of *Burdine*, in which this Court stated that at the third, or pretext, stage of the *McDonnell Douglas* order of proof, the plaintiff's burden of proving pretext "merges" with his or her ultimate burden of persuasion on the question of intentional discrimination. *Burdine*, 450 U.S. at 256. They reason that, once the plaintiff has shown the defendant's proffered explanation is untrue, the only remaining inference is that the defendant has discriminated. *See, e.g., Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567, 577 (1978). This "literal" approach to the *McDonnell Douglas–Burdine* analysis prevailed for approximately the first fifteen years after this Court announced the standard.

Another viewpoint, of relatively recent vintage, is advanced by the so-called "pretext-plus" courts. These courts contend that the plaintiff must prove that the defendant's proffered reasons are untrue, and also must demonstrate affirmatively that there can be no explanation for the defendant's conduct other than intentional discrimination. These courts assert that proving pretext at the third stage of the *McDonnell Douglas–Burdine* formulation is not synonymous with proving pretext for discrimination. In effect, the "pretext-plus" courts argue that, notwithstanding the literal language of *McDonnell Douglas*, *Burdine*, *Furnco* and subsequent decisions of this Court, the burdens of proving pretext and

intentional discrimination do not merge, so that a plaintiff can establish pretext without having proved discrimination.

As discussed below, it is the analysis of the "pretext only" courts that faithfully follows the language and underlying reasoning of the *McDonnell Douglas-Burdine* framework and this Court's subsequent decisions.

A. This Court Has Always Contemplated That Proof Of Pretext Is Tantamount To Proof Of Discrimination Entitling The Plaintiff To Prevail

The Eighth Circuit's ruling that Hicks was entitled to prevail once he proved that the reasons proffered by defendants were not the true reasons for his demotion and termination broke no new ground. On the contrary, it is consistent with this Court's many pronouncements on the subject. Specifically, this Court has held that (1) proof of pretext is proof of pretext for discrimination; and (2) once the plaintiff proves that the defendant's proffered explanation is pretextual, the only justifiable result is that the plaintiff must prevail on its discrimination claim because the defendant has offered no legitimate explanation for its conduct.

From the first, this Court made it clear that the pretext with which it was concerned was "a coverup for a . . . discriminatory decision." *McDonnell Douglas*, 411 U.S. at 805. In *McDonnell Douglas*, this Court stated:

> While Title VII does not, without more, compel rehiring of [plaintiff], neither does it permit [defendant] to use [plaintiff's] conduct as a *pretext for the sort of discrimination prohibited by § 703(a)(1).*

Id. at 804 (emphasis supplied). Proving pretext would be irrelevant unless the fair inference to be drawn from doing so was that discrimination was the unstated reason for the employer's action. For that reason, the *McDonnell Douglas* Court also held that the plaintiff "must be given a full and fair opportunity to demonstrate by competent evidence that *the presumptively valid reasons for his*

rejection were in fact a coverup [*i.e.*, a pretext] *for a racially discriminatory decision.*" *Id.* at 805 (emphasis supplied). The Court went on to state that, if the plaintiff proved that the employer's articulated rationale was "a pretext or discriminatory in its application[,]" the district court "must order a prompt and appropriate remedy." *Id.* at 807. In other words, if a plaintiff proves pretext, he or she prevails.

Any doubt that this Court equated "pretext" with a "coverup for a . . . discriminatory decision" was laid to rest in *Furnco*. In an opinion by Justice Rehnquist, this Court expanded on what was implicit in *McDonnell Douglas*:

> A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, *if otherwise unexplained*, are more likely than not based on the consideration of impermissible factors . . . . And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race.

Id. at 577 (emphasis in original and supplied). Thus, the Court recognized that if an employer who was charged with discrimination failed to explain his conduct on some other basis, it was more likely than not that the employer was guilty of discrimination. In *Furnco*, this Court explicitly equated "pretext" with "coverup for discrimination" when it stated: "The plaintiff must be given the opportunity to introduce evidence that the proffered justification is merely a pretext for discrimination." *Id.* at 578.

The Court reiterated that equation in *Burdine*, the next major case discussing the Title VII burden of proof. In discussing

the third stage of the *McDonnell Douglas* standard, the *Burdine* Court stated: "[T]he plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were *a pretext for discrimination.*" *Id.* at 253 (emphasis supplied). The Court in *Burdine* was equally clear about how the Title VII plaintiff could meet his or her burden of proving pretext for discrimination:

> [The plaintiff] may succeed in . . . [proving that the reasons offered by the defendant were a pretext for discrimination] either directly by persuading the court that a discriminatory reason more likely motivated the employer *or indirectly by showing that the employer's proffered explanation is unworthy of credence.*

Id. at 256 (emphasis supplied).

Throughout the development of the *McDonnell Douglas-Burdine* framework, proving pretext by demonstrating that the nondiscriminatory reasons offered by the defendant were not the true motivation for its conduct has been deemed sufficient to carry the plaintiff's burden. As the Court held in *McDonnell Douglas*, sustaining that burden warrants judgment for the plaintiff. *Id.* at 807. Put otherwise, the plaintiff's burden to prove pretext ". . . merges with the ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination." *Burdine*, 450 U.S. at 256. As one commentator has noted:

> the Court [did not] intend[] this language [in *Burdine*] to impose two separate burdens on plaintiffs. The phrase "merges with" in *Burdine* cannot reasonably be understood to mean "is separate from." Rather, *the term "merge" should be given its ordinary meaning: "To cause to be absorbed as to lose identity."* When read in this common sense way, *Burdine* furnishes even more support for reading "pretext" as synonymous with "pretext for discrimination."

Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases*, 43 Hastings L.J. 57, 120 (1991) (emphasis supplied).

Petitioners argue that this Court's opinion in *Aikens* imposes on Title VII plaintiffs an obligation to do more than prove that the employer's explanations are pretextual. In that case, the Court stated:

> [W]hen the defendant fails to persuade the district court to dismiss the action for lack of a prima facie case, and responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection, the factfinder must then decide whether the rejection was discriminatory within the meaning of Title VII. At this stage, the *McDonnell-Burdine* presumption "drops from the case," . . . and "the factual inquiry proceeds to a new level of specificity."

Id. at 714–15 (quoting *Burdine*). From this, petitioners urge that this Court has imposed on Title VII plaintiffs a burden *in addition to* the old "merged" burden of proving discrimination by proving pretext and thereby eliminating defendants' proffered reasons as possible explanations.

That is simply not so. All this Court did in *Aikens* was recognize what is true in every civil case -- namely, that once a defendant produces evidence that runs contrary to a legal presumption, the plaintiff's *prima facie* case is no longer presumptively conclusive. *See* Fed. R. Evid. 301; 1 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence* ¶ 300[01] at 300–4 (1990). But, the fact that a presumption is *rebutted* does not mean that it is *discredited* or that the inference that was once presumed cannot still be drawn. Again, *Burdine* is instructive:

> In saying that the presumption drops from the case, we do not imply that the trier of fact no longer may consider evidence previously introduced by the plaintiff to establish a prima facie case . . . .

this evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual.

Id. at 255 n.10.

In *Aikens*, this Court meant no more than that the trier of fact in a Title VII case, like the trier of fact in any civil case, must weigh each side's explanation and decide which version is more likely than not the correct version. On this point, the Court was quite explicit:

As we stated in *Burdine*:

> "The plaintiff retains the burden of persuasion . . . . *[H]e may succeed in this [burden]* either directly by persuading the court that a discriminatory reason more likely motivated the employer *or indirectly by showing that the employer's proffered explanation is unworthy of credence."* 450 U. S., at 256.

> In short, the district court must decide *which party's explanation of the employer's motivation it believes*.

Id. at 716 (emphasis supplied). Thus, once plaintiff proves that defendant's stated reason is pretextual the only remaining explanation for defendant's conduct is intentional discrimination.

B. The Inevitable Result Of The "Pretext-Plus" Argument Is To Put Title VII Plaintiffs On A Slippery Slope Toward A Direct Evidence Requirement, Thereby Vitiating The McDonnell Douglas-Burdine Standard

If there has been a consistent thread in the development of Title VII law, it has been that a plaintiff need not introduce direct evidence of discrimination in order to prevail. Under the *McDonnell Douglas-Burdine* analysis, plaintiff may prevail "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256. The Court reaffirmed this rule in *Aikens*: "[T]he *McDonnell Douglas* formula does not require direct proof of discrimination." *Id.* at 714 n.3 *citing Teamsters*, 431 U.S. at 358 n.44. Indeed, this Court has previously held: "[T]he *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination." *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121 (1985).

The "pretext-plus" courts are careful to pay lip service to this requirement and to insist that they do it no violence. But the practical effect of their decisions is to impose on Title VII plaintiffs, either overtly or *sub silentio*, the requirement of producing the direct evidence of discrimination that this Court has recognized is elusive and seldom available. Two different lines of argument demonstrate that this will be the inevitable outcome of endorsing the "pretext-plus" standard.

First, the "pretext-plus" approach requires the plaintiff to read the mind of a non-party, to comb the record and try to fathom what conceivable explanations the trier of fact might find lurking there. Under this approach, the plaintiff cannot fulfill his or her ultimate burden of persuasion simply by rebutting the explanations proffered by the defendant – explanations that he or she has had a full and fair opportunity to examine and attack. The plaintiff must also identify and rebut all possible hidden motives that might appeal to the trier of fact. In some instances, the plaintiff might be placed in the untenable position of attempting to rebut a possible

explanation for the defendant's conduct that the defendant has expressly denied.

This very case proves the point. The district court ruled that Hicks had not proved that "personal motivation" was not the catalyst in the decision to terminate him. But Hicks had no reason to assume that he needed to rebut any inference that personal animosity toward him was the reason for his termination. Captain Powell denied that he had prompted a confrontation with Hicks or that he had any difficulties with him. (J.A. 38, 44, 46). Nor did petitioners introduce any evidence of personal animosity toward Hicks on the part of Superintendent Long, who actually made the recommendation to terminate Hicks. (Pet. App. A-19).

Because few, if any, Title VII plaintiffs could expect to prevail under such a system, the only realistic option is for a plaintiff to introduce direct evidence of discrimination. But, as this Court has repeatedly recognized, such a requirement would be all but impossible to meet. *See, e.g., Aikens*, 460 U.S. at 716 ("There will seldom be 'eyewitness' testimony as to the employer's mental processes."); *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring in judgment) ("As should be apparent, the entire purpose of the *McDonnell Douglas* prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by.")

Second, imposition of a direct evidence requirement, either overtly or *sub silentio*, would effectively eviscerate the plaintiff's ability to prevail, even in a meritorious case. The evidence of this proposition already exists. In the overwhelming majority of "pretext-plus" decisions cited to this Court by petitioners and their supporting *amici*, the defendant employer won. *See, e.g., E.E.O.C.* v. *Flasher Co.*, 60 Fair Empl. Prac. Cas. (BNA) 814 (10th Cir. 1992); *Galbraith* v. *Northern Telecom, Inc.*, 944 F.2d 275 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 1497 (1992); *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5 (1st Cir. 1990); *Holder* v. *City of Raleigh*, 867 F.2d 823 (4th Cir. 1989); *Benzies* v. *Illinois Dep't of Mental Health & Developmental Disabilities*, 810 F.2d 146 (7th Cir.), *cert. denied*, 483 U.S. 1006 (1987). This occurred whether or not the plaintiffs relied solely on an attempt to

prove pretext, *see, e.g., Medina-Munoz*; *Benzies*, or introduced other credible evidence from which the trier of fact could infer discrimination. *See, e.g., Villanueva* v. *Wellesley College*, 930 F.2d 124 (1st Cir.), *cert. denied*, 112 S. Ct. 181 (1991); *Galbraith*; *Holder*; *Sims* v. *Cleland*, 813 F.2d 790 (6th Cir. 1987) (defendant prevailed although plaintiff proved that one of the proffered reasons was pretextual and introduced evidence of direct discrimination).

Again, this case is a prime example of the phenomenon. Hicks introduced a significant amount of evidence that tended to demonstrate discrimination against African-American supervisors at St. Mary's beginning in January 1984:

> (1) he was the only shift commander who was disciplined for violations actually committed by his subordinates -- white shift commanders were not similarly disciplined;
>
> (2) white co-workers who committed much more serious violations than Hicks were either not disciplined or were treated more leniently;
>
> (3) twelve African-Americans had been terminated at St. Mary's in 1984 while only one white had been terminated;
>
> (4) prior to 1984 there were one white and five African-Americans in supervisory positions -- after the 1984 personnel changes at St. Mary's there were four whites and two African-Americans in supervisory positions;
>
> (5) five of the ten whites on the St. Mary's custody roster as of April 1984 had been promoted; and
>
> (6) a 1980-1981 study of St. Mary's concluded that "too many blacks were in positions of power at St. Mary's[.]"

(Pet. App. A-21, A-23–A-28, A-6 n.6). Despite all this evidence, Hicks was unable to prevail.

In only one of the "pretext-plus" cases cited by petitioners did the plaintiff prevail after trial. In *Mister* v. *Illinois Central Gulf R.R. Co.*, 832 F.2d 1427 (7th Cir. 1987), *cert. denied*, 485 U.S. 1035 (1988), the Seventh Circuit reversed a judgment for defendant against a class of African-American job applicants who had alleged racially discriminatory hiring practices because of unusually strong evidence of discrimination, which prompted the court to state: "It is hard to imagine a stronger case, short of an announcement of discrimination." *Id.* at 1430. The only other two cases cited by petitioners in which plaintiffs obtained a favorable decision were cases in which the defendant was unable to obtain summary judgment, either on motion or on appeal. *See Shager* v. *Upjohn Co.*, 913 F.2d 398 (7th Cir. 1990); *Veatch* v. *Northwestern Memorial Hosp.*, 730 F. Supp. 809 (N.D. Ill. 1990). Interestingly, in both cases the plaintiffs survived summary judgment by introducing direct evidence of discrimination. *See Shager*, 913 F.2d at 402, and *Veatch*, 730 F. Supp. at 820.

Thus, the conclusion that must be drawn is the only conclusion that can be drawn: overturning the Eighth Circuit's decision and imposing a "pretext-plus" rule will mean that plaintiffs will be unable to prevail unless they can introduce direct evidence of discrimination, thereby reversing the underlying premise of *McDonnell Douglas*, *Burdine* and *Aikens* and undoing 20 years of consistent decisions under Title VII.

II.

ADOPTION OF THE "PRETEXT-PLUS" STANDARD WOULD EITHER DENY PLAINTIFFS A FULL AND FAIR OPPORTUNITY TO PROVE PRETEXT FOR DISCRIMINATION OR WOULD UNDULY COMPLICATE THE TRIAL OF TITLE VII CASES

A. The Plaintiff's Right To A Full And Fair Opportunity To Prove Pretext Requires The Defendant To Advance The Actual Reason For Its Actions Or Risk An Adverse Verdict

Under *McDonnell Douglas* and its progeny, the employer must proffer a reason that is both nondiscriminatory *and legitimate* in order to rebut the presumption raised by the plaintiff's *prima facie* case. This is not a heavy burden for a defendant to meet. However, it is a two-fold burden: the words "legitimate" and "nondiscriminatory" are not synonymous. "Nondiscriminatory" means not "applying or favoring discrimination in treatment," while "legitimate" means "being exactly as proposed: neither spurious nor false." *See* Webster's *New Collegiate Dictionary* (1977) at 327, 657. Thus, the Title VII defendant cannot accomplish the objective of producing evidence sufficient to rebut the presumption without offering the court the actual motivating reason.

That the employer was required to provide the actual justification for the adverse employment action taken against the plaintiff can fairly be inferred from the language of *McDonnell Douglas* and *Burdine*. Thus, in *McDonnell Douglas*, this Court stated that a Title VII plaintiff must "be afforded a fair opportunity to show that [defendant's] *stated reason* for [plaintiff's] rejection was in fact pretext." *Id.* at 804 (emphasis supplied); *Furnco*, 438 U.S. at 578 (same); *Burdine*, 450 U.S. at 253, 256 (same); *Aikens*, 460 U.S. at 716 n.5 (same). In *Burdine*, this Court made it clear that the defendant's burden of production did not encompass the proffer of a sham reason, but that the employer must come forward with its actual motivation:

> [T]he defendant's explanation of its legitimate reasons must be clear and reasonably specific. . . . This obligation arises both from the necessity of rebutting the inference of discrimination arising from the prima facie case *and from the requirement that the plaintiff be afforded "a full and fair opportunity" to demonstrate pretext*.
>
> . . .
>
> the defendant's evidence [must] raise[] a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. *The explanation provided must be legally sufficient to justify a judgment for the defendant*.

Id. at 258, 254–55 (emphasis supplied). And as this Court held in discussing another aspect of Title VII, a defendant may not prevail "by offering a legitimate and sufficient reason for its decision *if that reason did not motivate it at the time of the decision*." *Price Waterhouse*, 490 U.S. at 252 (emphasis supplied).

Yet the "pretext-plus" courts hold -- openly and unabashedly -- that Title VII defendants can meet their burden of production at step two of the *McDonnell Douglas* formulation by producing some evidence of a nondiscriminatory reason for taking adverse action against the plaintiff, even if that reason is spurious and false -- *i.e.*, even if it is not the defendant's actual motivating reason. The "pretext-plus" courts actually reward defendants who proffer sham motivations for their actions by permitting them to prevail unless the plaintiff demonstrates that every plausible but unarticulated reason for the employer's action is false.

The clearest statement of this unorthodox approach to justice was set forth by the Seventh Circuit in *dictum* in *Pollard* v. *Rea Magnet Wire Co., Inc.*, 824 F.2d 557, 559 (7th Cir.), *cert. denied*, 484 U.S. 977 (1987):

> Showing that the employer dissembled is not necessarily the same as showing "pretext *for discrimination*," however, as we stressed in *Benzies*, it may mean that the employer is trying to hide some other offense, such as a violation of a civil service system or collective bargaining agreement.

(Emphasis in original). *See also Benzies*, 810 F.2d at 148 ("A demonstration that the employer has offered a spurious explanation is strong evidence of discriminatory intent, but it does not compel such an inference as a matter of law . . . . The trier of fact may find, however, that some less seemly reason—personal or political favoritism, a grudge, random conduct, an error in the administration of neutral rules—actually accounts for the decision."); *Villanueva*, 930 F.2d at 128 (". . . the mere showing that the employer's articulated reason may shield another (possibly nondiscriminatory) reason does not create a dispute of material fact."); *Veatch*, 730 F. Supp at 819 (although plaintiff survived defendant's summary judgment motion, the court noted that "[e]ven if the employer lies about the real reasons for the firing, other reasons, not impermissible under federal law, might be suggested by the evidence.")

The fear expressed by the "pretext-plus" courts is that a plaintiff will prevail in a Title VII case whenever the trier of fact disapproves of the defendant's employment decision, even if it was motivated by something other than the sort of discrimination forbidden by Title VII. In other words, the fear is that Title VII will become a "just cause" statute for all who fall under its protective scope. *Pollard*, 824 F.2d at 560–61.

But this fear is unfounded. If, for example, the defendant employer took an adverse employment action against a Title VII plaintiff because of a good faith mistake about the plaintiff's job performance, or out of an error in administering neutral employment rules, all that is required is that the employer come forward with its true motivation. The trier of fact should then find that the plaintiff loses because he or she failed to prove pretext.

That is precisely what occurred in *Pollard*, 824 F.2d at 559–60. There, the defendant employer argued that it had dismissed an employee because the employee had taken an unauthorized absence from work to attend a body-building event. The plaintiff proved that he had in fact been absent from work because he was injured—*i.e.*, he proved that the employer acted on the basis of a mistaken belief. However, as the Seventh Circuit found, the employer terminated the plaintiff because it believed in good faith (albeit mistakenly), that the plaintiff had missed work to attend the body-building event. Therefore, the Seventh Circuit reversed the district court, holding that the plaintiff had failed to prove pretext because the employer had terminated him based on its own good faith mistake. *Id.* at 559. *See also Billups* v. *Methodist Hosp. of Chicago*, 922 F.2d 1300, 1304 (7th Cir. 1991) ("[O]ur inquiry is limited to whether the employer's belief was honestly held."); *Grohs* v. *Gold Bond Bldg. Products*, 859 F.2d 1283, 1288–89 (7th Cir. 1988), *cert. denied*, 490 U.S. 1036 (1989) (same); *Samuels* v. *Raytheon Corp.*, 934 F.2d 388, 392–93 (1st Cir. 1991) (same). That is decidedly different from the situation in which the plaintiff demonstrates that the defendant was not in fact motivated by the stated reason (*i.e.*, the employer did not really believe the plaintiff was taking an unauthorized absence, but stated it so believed to cover up some other motive.)

If, however, the employer proffers a pretextual justification in order to avoid disclosing that its real reason involved a violation of some other statute or regulation, or of its own procedures, there is no policy reason why the courts should protect the employer from having to disclose this violation in order to prevail against the discrimination charge. A defendant in a discrimination suit enjoys no privilege from disclosing the truth just because it happens to be unpalatable, or even illegal. In fact, offering an employer defendant such extraordinary protection could violate the plaintiff's rights to a full and fair hearing in another respect, because, as this Court has previously held, departures from regulations or ordinary procedures can be evidence of intentional discrimination. *See Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 267 (1977).

It may be true that some triers of fact have found discrimination in cases where there was none, simply because they

were outraged at the defendant employer's conduct. That clear error, however, cannot justify a rule that permits, even encourages, employers to proffer false and spurious explanations for their conduct in order to justify a finding in their favor:

> [T]here is no rational reason for giving a defendant who has lied about the reasons for its actions a presumption that its lie does not conceal illegal conduct. In no other area of the law would a lying defendant be accorded such solicitude. Ordinarily lack of credibility may be considered as adverse evidence. There is no principled reason why the same result should not obtain here. To presume that a defendant who offered a false reason for its actions in court did so for benign reasons is illogical.

Lanctot, *supra*, at 133. Protecting an employer who lies about its true motives is at odds with traditional evidentiary principles. For example, it is well-settled that a trier of fact may draw an unfavorable inference against a party who lies in court. *See*, *e.g.*, 3 Edward J. Devitt, Charles B. Blackmar & Michael A. Wolff, *Federal Jury Practice and Instructions* § 73.04, at 55 (4th ed. 1987) ("If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness's testimony in other particulars and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.")

A similar rule provides that unfavorable inferences may be drawn against a party who destroys evidence in its control or fails to produce a witness in its control. *See*, *e.g.*, 2 John H. Wigmore, *Evidence in Trials at Common Law* § 291, at 228 (1979) ("The failure or refusal to produce a relevant document, or the destruction of it, is evidence from which alone its contents may be inferred to be unfavorable to the possessor . . . ."); 3 Devitt, Blackmar & Wolff, *supra* § 72.15, at 45 ("If a party fails to call a person who possesses knowledge about the facts in issue, and who is reasonably available to him, and who is not equally available to the other party, then you may infer that the testimony of that witness is unfavorable to the party who could have called him and did not."); *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 226 (1939)

(failure of defendants to call witnesses within their control to contradict allegations of their unlawful conduct "is itself persuasive that their testimony, if given, would have been unfavorable . . . .")

Thus, common evidentiary practice does not justify the result urged by the "pretext-plus" courts -- that a defendant may lie and nonetheless prevail. If a defendant lies in a Title VII case, an inference of discrimination should be drawn against it. *See, e.g., Chipollini* v. *Spencer Gifts, Inc.*, 814 F.2d 893, 899 (3d Cir.) (*en banc*), *cert. dismissed*, 483 U.S. 1052 (1987) ("A defendant which is less than honest in proffering its reasons for discharge risks an unnecessary . . . discrimination verdict."); *Valdez* v. *Church's Fried Chicken, Inc.*, 683 F. Supp. 596, 634-35 (W.D. Tex. 1988) ("An employer cannot come forward with any reason justifying the job discharge, but must instead come forward with only legitimate reasons . . . . Once [p]laintiff has shown that [d]efendant's proffered reason is unworthy of belief, the case is over.")

It is equally clear that the defendant -- not the trier of fact -- must proffer the reason explaining the defendant's conduct. As the *Burdine* Court noted: "An articulation not admitted into evidence will not suffice." *Id.* at 255 n.9.

Lanphear v. *Prokop*, 703 F.2d 1311 (D.C. Cir. 1983) is directly on point. In *Lanphear*, plaintiff, a white male, filed a reverse discrimination suit after his employer rejected him for a position that was subsequently filled by an African-American male. After plaintiff established his *prima facie* case, the employer argued that plaintiff's "poor performance" was the reason for his rejection. *Id.* at 1316. The district court disregarded defendant's proffered reason and granted judgment for defendant on a completely different ground—that defendant "simply wanted 'to inject new blood . . .' by means of a 'change in personnel' . . . ." *Id.*

The D.C. Circuit reversed, noting that the reasons actually advanced by defendant for plaintiff's rejection had been "decisively refuted" by the evidence (*id.* at 1317), and also that the district court's explanation was unsupported by the evidence and by defendant itself:

> The entire basis for this "clean sweep" justification presented by the district court appears to stem from a stray suggestion. . . . There is no indication that this suggestion was followed. . . . More important, . . . *the selecting official, never offered it as a reason for not selecting [plaintiff]. Nor was it ever put forward as a justification by the [defendant], either before this court or below. In fact, the [defendant] has explicitly disavowed it.*

Id. at 1316 (emphasis supplied).

Moreover, the D.C. Circuit found that the district court erred in substituting its own explanation because under *McDonnell Douglas-Burdine* the defendant must proffer a reason in order to satisfy its burden of production and permit plaintiff a full and fair opportunity to rebut:

> The district court's substitution of a reason of its own devising for that proffered by [defendants] runs *directly counter* to the shifting allocation of burdens worked out by the Supreme Court in *McDonnell Douglas* and *Burdine*. The purpose of that allocation is to focus the issues and provide plaintiff with "a full and fair opportunity" to attack the defendant's purported justification. *That purpose is defeated if defendant is allowed to present a moving target or, as in this case, conceal the target altogether. . . .*
>
> . . .
>
> It should not be necessary to add that the *defendant cannot meet its burden by means of a justification articulated for the first time in the district court's opinion.*

Id. at 1316-17 (emphasis supplied). The ruling in *Lanphear* is particularly apt in the present case, where the district court also substituted its own unsupported reason -- "personal motivation" -- to explain petitioners' conduct.

There is nothing in *McDonnell Douglas* or *Burdine* to countenance an employer's masking the true reason for its decision

– in effect, perpetrating a fraud on the court – and then requiring a plaintiff who is not confronted with that reason to try to figure out what that reason might be and rebut it. The only fair and justifiable solution to the fear expressed by the "pretext-plus" courts is to require employer defendants to come forward with the actual factors that motivated their decisions, even if those factors are bad, embarrassing or unsavory, and to instruct triers of fact (who will increasingly be juries in light of the Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071 (1991)) that only discrimination is barred by Title VII.

B. The Approach Of The "Pretext-Plus" Courts Would Lead To An Administrative Quagmire In Discrimination Cases, And Runs Counter To The Principles Underlying Fed. R. Civ. P. 16

If the plaintiff's full and fair opportunity to prove pretext is to survive the onslaught of the "pretext-plus" approach, then Title VII trials cannot be turned into guessing games. Either Title VII plaintiffs must be permitted to prevail once they have proved defendants' proffered reasons are pretextual, or they must have an opportunity to establish, after notice, that an explanation proffered by the trier of fact is as "unworthy of credence" as the employer's explanation proved to be. *See, e.g., IMPACT* v. *Firestone*, 893 F.2d 1189, 1194 and n.5 (11th Cir.), *cert. denied*, 498 U.S. 847 (1990) (plaintiff must be provided "a fair opportunity to cross-examine the defendant's witnesses as to the actual reason which is testified to.")

The latter alternative would seem to require some sort of bifurcated trial. One possible scenario: the trier of fact would need to render an interim verdict after the *McDonnell Douglas-Burdine* proof goes in. If it ruled that the defendant's articulated explanations were pretextual, the trier of fact would need to identify any other explanations that, in its opinion, could account for the challenged employment decision. In jury cases, this would necessitate jury interrogatories; in bench trials, the court would have to issue some sort of advisory opinion. The plaintiff would then have to be given an opportunity – perhaps even after additional discovery – to rebut the explanations identified by the trier of fact. Without such a procedure, the plaintiff would never have the full and fair

opportunity to prevail that was guaranteed by this Court in *McDonnell Douglas* and its progeny.

Merely setting forth the order of proof necessary under such a system demonstrates how alien it is to our rule of jurisprudence and how cumbersome it would be for the courts to administer. The whole purpose of the Federal Rules of Civil Procedure and local court rules concerning the conduct of litigation is to *narrow* and *focus* the issues in a civil case prior to trial. As this Court ruled in *Burdine*, that same goal of narrowing and focusing the issues is the reason the defendant is required to produce a legitimate, nondiscriminatory explanation for its conduct. *See Burdine*, 450 U.S. at 255 n.8 ("the allocation of burdens . . . is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination.") It hardly serves that goal to construct an evidentiary framework that permits a defendant to prevail on the basis of an argument it has never made, and perhaps even abjures.

All of the protections of federal trial procedure would be undermined by a system that permitted rebuttable issues to be advanced *after* the case was closed. Obviously, a plaintiff has no reason to pursue discovery into a non-issue – in this case, where Captain Powell denied that he had any difficulties with Hicks and defendants did not advance personal animosity as their motive, Hicks had no incentive to inquire more deeply into the "issue" that would later prove dispositive to the district court. Moreover, parties are routinely limited to proving the matters specified in their court-approved pre-trial orders, which control the subsequent course of a litigation and which a district court has no obligation to modify once entered. *See* Fed. R. Civ. P. 16(e); *Daniels* v. *Board of Education*, 805 F.2d 203, 210 (6th Cir. 1986); *Roland M.* v. *Concord School Comm.*, 910 F.2d 983, 999 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 1122 (1991). All of these procedural rules will have to be revised if a plaintiff is to retain a full and fair opportunity to prevail on the basis of indirect evidence even as the *McDonnell Douglas-Burdine* framework is eviscerated by a "pretext-plus" approach.

CONCLUSION

For the foregoing reasons, the judgment of the Eighth Circuit should be affirmed.

Respectfully submitted,

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